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No. 10-1084

Supreme Court, U.S.
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In The

Supreme Court of the United States

COREY FERGUSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

COREY FERGUSON
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QUESTIONS PRESENTED

1. Whether there is a reasonable possibility that when the staff lawyers in a prosecutor's office have the burden of letting the left hand know what the right hand is doing or has done in violation of *Brady* and *Giglio*, require a new trial where the Government failed to disclose a § 5k1.1 cooperation agreement of a key witness during trial, in which misleads the jury can be said with confidence that the jury's verdict would have been the same if the jury was made aware of the witness's false testimony.

2. Whether using only the words (harmless error) satisfies Article VI of the United States Constitution under *Chapman v. California*, wherein this Supreme Court commanded, that "to determine whether the error was harmless under *Chapman*" the question this Court must ask is whether, absent the improperly admitted [evidence], it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty.

3. Whether an agreement between the prosecution and a witness is required under *Brady* before the prosecution must disclose evidence of potential or actual lenient treatment.

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STATEMENT

On pages 5-10 in the Government's brief, they simply speculate about the testimony regarding William Downey, with the proposition that Downey was not the key witness, and Shanklin's testimony in connection with other evidence easily supports the jury's verdict. Nevertheless, a complete review of the trial transcripts indicates otherwise. For instance, during cross examination, William Downey testified that he kept cash in a "Nike" shoe box. The testimony was surely comparable to codefendant Shanklin's February 1, 2006, transaction. Furthermore, Downey agreed with the Government that using shoe boxes "may" or "may not" be some kind of tool of the trade for drug traffickers to move money around in.

More to the point, Ms. Lawless neatly provided Downey with an editorial comment, urging "it looks kind of innocent at least if you've got a shoe box sitting over somewhere? People may or may not pay that much attention to it, would you agree with that?" Downey answered: "YES". Consequently, there is absolutely no reason to believe that Downey's neatly designed testimony did not advance the jury's belief that Ferguson used shoe boxes for the movement of money and drugs. Also, Ms. Lawless' editorial style of questioning Downey reinforced his testimony, likewise it reinforced the testimony of Detective Sutter regarding the illegally shown video of the search of Ferguson's home, which was admitted into evidence for the jury's consideration.

In addition, Downey testified that his surveillance equipment was operational for protection against intruders such as the police. Surely, Ms. Lawless' line of questioning Downey, together with his answers to her definitions, gave answers to the jury that Ferguson was at least a powder cocaine dealer and he used the shoe boxes and illegally seized surveillance equipment taken from his home to advance security on the drugs and money derived from such activity.

Furthermore, during redirect, Ms. Lawless stated on the record that the best deal Downey could only hope for was what is in the plea agreement. In addition, she assured the jury, court and defense, that there was no promise of a 5k1.1, in Downey's plea agreement or motion asking Judge Russell to lower his sentence. Subsequently, Ms. Lawless expressly admitted to the jury that the best Downey could hope for was the "20 year sentence". Of course, there is absolutely no basis to believe that the jury did not consider beyond a reasonable doubt that the Government had not allowed Downey to testify falsely about the plea agreement.

Unfortunately, the Government had a hinged undisclosed agreement that substantiated that the prosecutor's office had in fact made a promise for a 5k1.1 motion to Downey, prior to his testimony, that was never revealed to the jury or defense during trial. Moreover, during Ms. Lawless' closing statement, she informed the jury that they have the drugs that were seized from the Downey residence, and the testimony

that they heard about Mr. Downey. Surely, the drugs seized from Downey was the only powder cocaine produced regarding count (1) of the element to distribute a mixture or substance containing a detectable amount of cocaine, which the jury convicted Ferguson of, beyond a reasonable doubt. Additionally, Ms. Lawless urged all of the acts of Ferguson we submit to you indicate consciousness of guilt. In addition, not only did Ms. Lawless embrace more than the fate of Downey's connection with Ferguson, she also reminded the jury that Ferguson and Downey may not get along, but they are going to do business because it is to each other's best interest to make money to sell more drugs and to move it along. Surely, her closing statements regarding Downey's testimony were pertinent components for each juror to consider independently, beyond a reasonable doubt, that Ferguson was a powder cocaine dealer.

Of course, Downey's false testimony deprived Mr. Kamenish of his duty to effectively cross examine him and prepare an adequate closing statement regarding his incentive to testify. In addition, his duty to effectively cross examine Downey and provide an adequate closing statement on behalf of his client was exacerbated by the Government's decision not to bring to the attention of the jury that the Government had in fact made an agreement with Downey prior to trial. Following Mr. Kamenish's closing statement, Ms. Lawless provided her rebuttal statement urging the jury to think about all of the

evidence that has been introduced to them and to find Ferguson guilty on all the charges.

Following Ms. Lawless' rebuttal statement, the Court provided and explained twenty-nine instructions to the jury. Based on the jury instructions, there is no reason to believe that the jury found Ferguson guilty beyond a reasonable doubt absent the testimony of Downey and all of the money and items seized from Ferguson's home. (A copy of the jury instruction is attached as App. "E" 5-141-171). For instance, instruction 16 allowed the jury to consider a reduced punishment in exchange for cooperation (App. "E" 5-156).

Of course, the Court instructed the jury that they should consider this testimony with more caution than the testimony of the other witnesses, and to consider whether the testimony may have been influenced by the Government's promise. The Court said "do not convict the defendant based on the unsupported testimony of such a witness, standing alone unless you believe the testimony beyond a reasonable doubt." This instruction absolutely supported the jury's verdict on behalf of Downey, because there was no reason for the jury to consider any reduced punishment against Downey in exchange for his testimony against Ferguson; unlike Shanklin and Cox, Downey testified that he was not testifying on behalf of a 5k1.1, promise of reduced punishment. Furthermore, had the Government not been allowed to present to the jury the barred Title III, interception of oral communications, including

the video recordings, without a showing of good cause before a Judge of competent jurisdiction.[1] Shanklin's and Cox's testimony would most definitely be standing alone.

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[1] The Government briefly asserts (Gov's. Brief page 5), the jury also viewed videotapes and cellular telephone records that corroborated Shanklin's testimony concerning the deal. Unfortunately, according to Chief Judge John G. Heyburn, II, the recordings were to be sealed and the seal verified by the signature of the Court: That said recording shall be protected from editing or alteration; that except as provided by § 2517 of Title 18 U.S.C. the contents of said recording shall be disclosed only upon order of this Court. (Id. App. "D", Court order filed under seal.) Of course, it is undisputed that the Government failed to comply with this order. There is no motion of good cause shown filed and no Court order unsealing the video recording. As a matter of fact, according to Attorney Kamenish, he reviewed all of his files and documents in detail. He has not been able to locate the Government's motion to unseal the wiretap application. (Id. Appendix "F").

In addition, Mr. Kamenish said "he was unable to locate any orders signed by Judge Russell, unsealing the electronic surveillance applications and discs." (Id. App. "G"). Unfortunately, the Government did not follow proper procedure and used the Title III wire communication in violation of well established law in the Sixth Circuit See: *United States v. Abraham*, 541 F.2d 624, (6th Cir. 1976). Of course, this Court, in reviewing a Federal Court of Appeals' decision, may in appropriate circumstances, consider issues not present in jurisdictional statement or petition for Certiorari, and not presented in Court of Appeals. *Vance v. Terraza*, 444 U.S. 252 (1980).

ARGUMENT

1. On (page 11 of the Government's Brief) the Government's proposition that petitioner's fact-bound arguments regarding the application of settled law to the facts of his case do not warrant further review is far-fetched and not supported by the Sixth Amendment, trial transcript, or their application of settled law to the facts of this case. In *Demarco v. United States*, 415 U.S. 499 (1974), this Court held unquestionably, had there been a promise to the witness prior to his testimony, *Giglio v. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U.S. 264 (1959) would require reversal of petitioner's conviction. See also *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009) holding like the majority of our sister circuits, we conclude that *Brady* requires disclosure of tacit agreements between the prosecutor and a witness. A deal is a deal-explicit or tacit. There is no logic that supports distinguishing between the two. The dissent in *Bell* illustrates the importance of disclosing a tacit agreement. [The requirement that] prosecutors disclose tacit agreements is undoubtly the correct result, as the same policies justifying the disclosure of explicit agreements also compel the disclosure of tacit agreements. Like explicit agreements, tacit agreements are likely to be relevant to credibility, and therefore should be disclosed to the jury. Indeed, tacit agreements may be more likely to skew the witness' testimony. In the case of an explicit agreement, the testifying witness will know what he can expect to receive in exchange for his testimony, and will know the conditions he must fulfill. When a witness is

instead led to believe that favorable testimony will be rewarded in some unspecified way, the witness may justifiably expect that the more valuable his testimony, the more valuable his reward. The threat of incorrect jury verdicts is further increased by tacit agreements because, when testifying, a witness whose agreement is tacit, rather than explicit, can state that he has not received any promises or benefits in exchange for his testimony . . . Likewise the prosecutor can argue to the jury that the witness is testifying disinterestedly, which artificially increases the witness' credibility – artificially, that is (560 F.3d 1187) because the premise of the argument is false. *Bell v. Bell*, 512 F.3d at 244-45 (Clay, J., dissenting). Furthermore as the Court said in 1952, the use of informers . . . may raise serious questions of credibility. *Robinson v. Mills*, 592 F.3d 730 (6th Cir. 2009) citing on *Lee v. United States*, 343 U.S. 747, 757 (1952). Indeed, jurors often have a negative predisposition toward informants. "Ordinary decent people are predisposed to dislike, distrust, and frequently despise criminals who 'sell out' and become prosecution witnesses. Jurors suspect their motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable . . . " Stephen S. Trott, Words of Warning for Prosecutors using criminals as witnesses, 47 Hastings L.J. 1381, 1385 (1996); see also *Banks v. Dretke*, 540 U.S. 668, 701-02 (2004) (favorably citing Trott, Words of Warning, supra). Of course, the Government is free to reward witnesses for their cooperation with favorable treatment in

pending criminal cases without disclosing to the defendant its intention to do so, provided that it does not promise anything to the witness prior to the testimony, *Ragheed Akrawi v. Booker*, 572, F.3d 252 (6th Cir. 2009) (quoting *Shazza v. Artuz*, 336 F.3d 154, 165 (2d Cir. 2003). However, as this Supreme Court has noted, cross-examination is the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970).

Based on all of the above authorities cited, forbidding prosecutors from making false representations concerning information within their possession furthers *Brady*'s goal of fair trials, and is consistent with the special role played by the American prosecutor in the search for truth in criminal trials.[2] *Banks*, 540 U.S. at 696 (quoting *Strickler*, 527 U.S. at 281).

Furthermore, the Government's reliance on *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) is wholly misplaced. For instance, the

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[2] Downey received his 5k1.1 promise from the same (AUSA), Ms. Lawless, who said she was not aware of any promise of a 5k1.1 with her office during trial. Subsequently, the Court indulged both Ms. Lawless and Downey's false testimony and awarded Downey two years off of his twenty year sentence for falsely testifying. Interestingly, the Court said "we will seal the part that lists the facts that warrant the government's motion for downward departure." (Id. App. "H" page 3). Of course, this Court has the authority to unseal the part that lists the facts that warrant the Government's motion for a downward departure for Downey's false testimony. See *United States v. Nixon*, 417 U.S. 960 (1974).

conflict in the Sixth Circuit Court of Appeals, including other circuits mentioned involves, who is being bound by the *Brady*, *Giglio* and *Chapman* standards handed down by this Court as the supreme law of the land, and who is not; as required by the supremacy clause. Under the supremacy clause, public officials have an obligation to follow the constitution even in the midst of a contrary directive from a superior or in a policy, *Kennedy v. City of Cincinnati,* 595 F.3d 327 (6th Cir. 2009). In addition, when called upon to construe and apply provisions of the constitution, the Supreme Court must look not merely to its language, but to its historical origin, and to the decisions of the Supreme Court in which its meaning and scope of its operation have received deliberate consideration. *Missouri v. Illinois,* 180 U.S. 208, 45 L.Ed. 497 (1901). For those reasons, this Court should answer the three questions on page one of the Petitioner's petition.

2. The Government urges that the Court of Appeals applied the *Chapman* standard. In addition, the Government said *United States v. Garcia*, 496 F.3d 495, 512 (6th Cir. 2007) can be used as a substitute for the *Chapman* standard and the word overwhelmingly satisfies beyond a reasonable doubt. Nevertheless, the Government's mischaracterization of the *Chapman* standard is even more egregious in light of the Courts of Appeals consistent interpretation of *Chapman*. Of course, unlike in Ferguson's case, in the following cases Judges Suhreinrich and Cole applied the proper *Chapman* standard. See *Dejesus v. Lafler,* 227 Fed. Appx. 594 (6th Cir. 2008); *U.S. v. Valentine*, 70 Fed. Appx. 314 (6th Cir. 2003); *U.S. v.*

Bond, 29 Fed. Appx. 241 (6th Cir. 2002); *Wilson v. Mitchell*, 498 F.3d 491 (6th Cir. 2007); *U.S. v. Kone*, 307 F.3d 430 (6th Cir. 2002). In each of these cases the panel clearly explained that before a Federal Constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. Citing *Chapman v. California*, 386 U.S. 18, 24. Furthermore, the *Chapman* standard requires the beneficiary (not the Judges) of a Constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990).

In *U.S. v. Lall*, 607 F.3d 1277 (11th Cir. 2010) the panel held in order to find that an error was harmless on direct appeal, "we must declare a belief that it is harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 the panel explained that the nature of Lall's statements and the physical evidence taken from his bedroom make it impossible to conclude that their admission was harmless beyond a reasonable doubt. More to the point, according to this Court in fashioning a harmless-constitutional-error rule, "we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." According to this United States Supreme Court in *Chapman* the Federal rule emphasizes substantial rights as do most others. The California Constitutional rules emphasize a

> miscarriage of justice, but the California Courts have neutralized this to some extent by emphasis, and perhaps overemphasis, upon the Court's view of overwhelming evidence. In the case at bar the Government's fact-bound disagreement with the *Chapman* standard urges this Court to treat the proper standard as a chameleon in cases. In addition, the words "harmless error" does not satisfy Article VI of the United States Constitution's supremacy clause, and using the words "overwhelming evidence" runs afoul of the words beyond a reasonable doubt, according to the *Chapman* Constitutional Standard.

At present, as all the testimonies and jury instructions show, Downey's testimony and seized evidence supported the guilty verdict, beyond a reasonable doubt, not Shanklin's or Cox's. Therefore, this Court should not squint narrowly at the petitioner's three questions to avoid granting this writ, or allow a bizarre extension of *Brady*, *Giglio*, and *Chapman* on the faulty premises prescribed by the Court of Appeals and Solicitor General.

CONCLUSION

The brakes were applied to the *Chapman's* standard, and the, *Brady* and *Giglio* requirements through the panel's about-face interpretation, so its uniform motion was changed. In addition, the *Chapman* standard, should not be treated as a chameleon magnet cited through other cases which are then "dipped" into a case such as this one: with

the proposition that using only the words "harmless error" satisfies Article VI of the United States Constitution, without declaring that absent the improperly admitted "evidence", it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty.

Therefore, based upon all the false testimony of Downey, and the illegally seized evidence, that was admitted into evidence without the jury being made aware of the situation there is absolutely no reason to believe that the jury which was previously empanelled in this case, would have independently found Ferguson guilty beyond a reasonable doubt, in a case hedged and hinged on convicts, liars, drug users and deal takers, absent the false testimony of Downey and the illegally seized evidence, had the jury been made aware of this information during trial. Surely, the jury properly followed the jury instructions.

Wherefore, based upon all of the above reasons as well as the petitioner's previous reasons this Court should grant this writ in favor of the public's best interest.

Respectfully submitted,

This the 14th day of June 2011

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January 31, 2011

Corey Ferguson, #09796-033
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Ashland, KY 41105

Dear Corey,

Thank you very much for your letter dated January 27, 2011. Per your request, enclosed find the copy of the electronic surveillance application, and an order signed by Judge Heyburn. Please note that Judge Heyburn signed the electronic surveillance order on January 24, 2006. In addition, please find enclosed the electronic surveillance termination order signed by Judge Heyburn on February 23, 2006.

I have reviewed all the documents in my possession I was unable to locate any orders signed by Judge Russell unsealing the electronic surveillance applications and discs.

If you need anything else, do not hesitate to contact me.

Very truly yours,

/s/ [Illegible]
Keith E. Kamenish

KEK:cap

Enclosures

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March 24, 2011

Mr. Corey Ferguson, #09796-033
Federal Correctional Institution
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Ashland, KY 41105

Dear Corey,

I have reviewed all my files in detail. I have not been able to locate the government's motion to unseal the wiretap applications.

Very truly yours,

/s/ Keith E. Kamenish
Keith E. Kamenish

KEK:lcf